1982

Utah Department of Business Regulation, Division of Public Utilities, Committee of Consumer Services v. Public Service Commission of Utah, Brent H. Cameron, Chairman, David R. Irvine, Commissioner, James M. Byrne. Commissioner : Brief of Intervenor Utah Power & Light Company

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Thomas W. Forsgren; Attorney for Intervenor-Defendant Utah Power & Light Company

Recommended Citation

Brief of Respondent, *Utah Dep't of Business Regulation v. Utah Public Service Comm'n*, No. 19361 (1982).
https://digitalcommons.law.byu.edu/uofu_sc2/4226

IN THE SUPREME COURT OF UTAH

UTAH DEPARTMENT OF BUSINESS
REGULATION, DIVISION OF PUBLIC
UTILITIES,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, BRENT H. CAMERON,
Chairman, DAVID R. IRVINE,
Commissioner, JAMES M. BYRNE,
Commissioner,

Defendants.

Case No. 19361

COMMITTEE OF CONSUMER SERVICES,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, BRENT H. CAMERON,
Chairman, DAVID R. IRVINE,
Commissioner, JAMES M. BYRNE,
Commissioner,

Defendants.

Case No. 19362

BRIEF OF INTERVENOR UTAH POWER & LIGHT COMPANY

DAVID L. WILKINSON
Attorney General
STEPHEN G. SCHWENDIMAN, Chief
Assistant Attorney General
CRAIG R. RICH
Assistant Attorney General
Tax and Business Reg. Div.
Attorneys for Plaintiff
Dept. of Business Regulation,
Division of Public Utilities

MARK C. MOENCH
Assistant Attorney General
Attorney for Plaintiff
Committee of Consumer Ser.

THOMAS W. FORSGREN
Attorney for Intervenor-
Defendant
Utah Power & Light
Company
P.O. Box 899
Salt Lake City, Utah 84110

IN THE SUPREME COURT OF UTAH

UTAH DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PUBLIC UTILITIES, Plaintiff, vs. PUBLIC SERVICE COMMISSION OF UTAH, BRENT H. CAMERON, Chairman, DAVID R. IRVINE, Commissioner, JAMES M. BYRNE, Commissioner, Defendants.	Case No. 19361
COMMITTEE OF CONSUMER SERVICES, Plaintiff, vs. PUBLIC SERVICE COMMISSION OF UTAH, BRENT H. CAMERON, Chairman, DAVID R. IRVINE, Commissioner, JAMES M. BYRNE, Commissioner, Defendants.	Case No. 19362

BRIEF OF INTERVENOR UTAH POWER & LIGHT COMPANY

DAVID L. WILKINSON
Attorney General
[illegible] G. SCHWENDIMAN, Chief
Assistant Attorney General
[illegible] I. RICH
Assistant Attorney General
for Business Reg. Div.
Attorneys for Plaintiff
Dept. of Business Regulation,
Division of Public Utilities

MARK C. MOENCH
Assistant Attorney General
Attorney for Plaintiff
Committee of Consumer Ser.

THOMAS W. FORSGREN
Attorney for Intervenor-Defendant
Utah Power & Light Company
P.O. Box 899
Salt Lake City, Utah 84110

TABLE OF CONTENTS

Page

POINT I

POINT II

POINT III

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Intervenor Utah Power & Light Company ("Utah Power" or "Company") filed an application with the Public Service Commission of Utah ("Commission") seeking to modify the accounting procedures of the Commission ordered Energy Balancing Account ("EBA") in order to satisfy the purpose of the account which is to prevent windfall benefits to either the Company or its ratepayers.

DISPOSITION BEFORE THE PUBLIC SERVICE COMMISSION

Utah Power upon application to the Commission sought and was granted an accounting procedure modification to the subject Energy Balancing Account.

RELIEF SOUGHT ON APPEAL

Intervenor Utah Power seeks a determination by this Court affirming the Commission Order issued in the subject case.

STATEMENT OF FACTS

The Commission in its Report and Order in Case Nos. 78-035-[illegible]1, 79-035-03, and 79-035-15 directed [illegible] Power, upon recommendation of the Plaintiff [illegible] to implement the balancing account procedure [illegible] in those orders for the purpose of eliminating "perceived inequitable results, as to both the Company and its ratepayers, occurring from inaccurate forecasting of non-tariff sales, surplus sales to other utilities, purchases from other utilities and fuel costs in rate cases." See Commission Order On Rehearing, Case No. 82-035-14, July 5, 1983, page 2. The Company subsequently established the account as ordered. The EBA procedure requires the Company to forecast anticipated revenues to be received from non-tariff and surplus sales and anticipated expenses to be incurred from purchased energy and fuel costs. After setting the components of the formula an EBA rate, if approved by the Commission, becomes a part of the Company's tariff and is the basis upon which rates are set and revenues are collected. During or at the end of the forecast period, retroactive adjustments are made to the EBA to bring the forecasted numbers into compliance with actual numbers. The result of the retroactive adjustments together with forecasted revenues and expenses for the next period are considered in the next EBA hearing and the process begins anew. See Commission Order On Rehearing, Case No. 82-035-14, July 5, 1983, pages 2-3.

In the case at bar through the period in question, the Company experienced substantially less [illegible] tariff customers than forecasted [illegible] result that generating capacity was idle. The [illegible] the idle generating capacity were borne [illegible] Company and its shareholders without off-setting revenue. The Company in an effort to use the [illegible] idle generating facilities aggressively [illegible] and found a market for the energy with non-tariff customers. The result was <u>non-tariff</u> sales exceeded those forecasted by $18,000,000.00. The Company by application to the Commission then sought modification of the EBA accounting procedure to enable [illegible] third of the revenue windfall from the non-tariff sales to flow to the Company and proposed that the other two thirds flow to the benefit of the Company's ratepayers. Under the EBA procedure, without the proposed modification, the revenue windfall would inure [illegible] to the benefit of the ratepayer. The evidence was that the proposed and authorized EBA accounting modification would not result in the Company earning [illegible] even near its authorized return on equity. [illegible])

The Division argued that the Company's request was being considered improperly as an energy cost passed through pursuant to §54-7-12(3)(d), Utah Code Ann. (1983 Supp.), that the accounting procedure [illegible] was retroactive ratemaking, and that [illegible] was not an energy cost pass-through

POINT I

THE COMMISSION'S ORDER ALLOWING AN ACCOUNTING MODIFICATION IN THE SUBJECT ENERGY BALANCING ACCOUNT DOES NOT CONSTITUTE A UTILITY RATE INCREASE OR RETROACTIVE RATEMAKING

Utah Code Ann. §54-7-12(2) (1983 Supp.) specifies the procedure pursuant to which public utilities may increase rates. Said section provides:

> (2) Any public utility that proposes to effect a rate increase shall file appropriate schedules with the commission setting forth the proposed rate increase. The commission shall, either upon complaint, or upon its own initiative without complaint, after reasonable notice, hold a hearing to determine whether the proposed rate increase, or some other rate increase, is just and reasonable. Except as otherwise provided in subsection (3) of this section, no proposed rate increase is effective until after completion of the hearing and issuance of a final order by the commission with respect to the proposed increase.

Subpart (3)(d) of §54-7-12 specifies an exception to the above described general rate case procedure for rate increases based upon increased costs to the utility for fuel or energy purchased or obtained [illegible] specified supplies. The "fuel pass-through procedure" enables rates to reflect relatively quickly the often changing cost of fuel and purchased energy.

[illegible] as the cost of fuel and purchased energy have fluctuated in both directions since the statute was enacted, the overall impact of the fuel pass-through procedure has been positive in impact to both the company and its ratepayers.

Other jurisdictions have adopted the fuel pass-through procedure and have recognized a distinction between the process necessary to secure general rate relief and the process necessary to secure rate relief for fuel and purchased energy costs. Courts have determined that the fuel pass-through procedure does not constitute retroactive ratemaking. In The City of Norfolk v. Virginia Electric & Power Company, [illegible] Va. 505, 90 SE2d 140 (1955), the Virginia Supreme Court of Appeals approved a fuel clause (referred to by that court as an escalator clause) for a power company under its jurisdiction, recognizing a distinction between rate fixing and approving a fuel clause. The Virginia court decided that the Virginia escalator clause did not fix rates retroactively:

> [T]he escalator clause is, therefore, highly remedial; it confers no benefit on the stockholders of the company except to help the avoidance of unjustified loss, and...it likewise deprives them of the possibility of keeping an unjustified gain.
>
> In approving the escalator clause the Commission did not fix rates retroactively, but on the contrary, it authorized and prescribed a fixed mathematical formula to be inserted in

> the schedules of the Company which will serve as a "guide, direction or rule of action" for determining future rates.

Id. at 146-48.

In North Carolina ex rel. Utilities Commission v. Edmisten, 30 N.C.App. 459, 227 SE2d 593 (1976), the question of whether or not a surcharge could be imposed to collect for increasing fuel costs under authority of a 1975 statute allowing fuel adjustment was discussed. The court determined that in August 1975 the State Utilities Commission's order allowing the power company to apply a temporary surcharge to collect its increased fuel charges for July and August of 1975 did not constitute retroactive rate fixing, but was a proper approval of the fuel clause designed to recover previously incurred costs. The attorney general had argued that part of the August [illegible], 1975 order allowing Duke Power Company ("Duke") to apply a temporary surcharge to collect its increased fuel costs for July and August of 1975 constituted retroactive rate fixing which was not authorized by the North Carolina statutes. He said that the Commission could not fix rates retroactively so as to make them collectible for past service. 227 SE2d at 599. The court later concluded that there was a difference between rate fixing and approving a fuel clause designed to recover previously incurred costs. The court found the Commission's position persuasive.

The facts of Edmisten, 1976, merit close [illegible]. The court decided that decisions made in [illegible] a general rate fixing case are not [illegible] in the case of a fuel adjustment clause. [illegible] authorized by the North Carolina Commission to [illegible] a fuel clause which was only a means to make [illegible] fuel a workable figure from the standpoint [illegible] its customers and was not meant to "fix [illegible]" 227 SE2d at 599. The court concluded that the [illegible] fuel used in the generating of electricity by a [illegible] utility should be treated as a factor separate [illegible] others in the utility's rate structure. Such [illegible] the intent of the general assembly in North Carolina when it enacted the statute authorizing such [illegible] adjustment. The statute in North Carolina [illegible] stated that a proceeding under it should not [illegible] a general rate case. 227 SE2d at 600. [illegible] outlined the procedures for considering an application to change the cost of fuel components and [illegible] the Commission to rule on the application [illegible] ninety days after it was filed. After October [illegible] Duke could not determine the actual cost of [illegible] kilowatt hour for a given month until two [illegible]. Therefore the bills rendered on January [illegible] increased fuel costs for November 1973 [illegible] a two month lag in recovering the increased fuel costs, necessitating the surcharge in question to be paid for July and August of 1975. The Supreme Court affirmed the Commission's action in authorizing the recovery of increased fuel costs and did not deem it an attempt by the utility to use a pass-through as means of increasing future rates nor the surcharge to be retroactive ratemaking or a rate change requiring a general rate case.

The facts in Edmisten, 1976, may be compared to the subject case. Utah's fuel adjustment clause statute [Utah Code Ann. §54-7-12(3)(d) (1983 Supp.)], like North Carolina's fuel clause, was designed so that the utility could recover fuel costs. In Edmisten the recovery of fuel costs was deemed necessary and was not determined by the court to be retroactive rate fixing, or an attempt by the utility to use the pass-through to increase future rates to make up for past deficits, or subject to the procedural requirements necessary for a rate increase. The accounting modification requested by Utah Power in the subject case is not an improper use of the EBA account, should not be subject to the procedures required in a general rate hearing, and is not retroactive rate fixing.

In North Carolina ex rel. Utilities Commission v. Edmisten, 291 NC 451, 232 SE2d 184 (1977), the court appears to reverse the decision made in Edmisten, 1976, cited supra. Shepard's Citations notes that

[illegible]

[illegible] Harrington, [illegible], the [illegible] [illegible], but [illegible] because [illegible] "illegal retroactive rate making," as the [illegible] argued, but because the Commission was [illegible] authorized to issue an order allowing the [illegible] the statute terminating such [illegible] increases be made effective September [illegible] 196[illegible]. [illegible] the [illegible] Harrington, [illegible], 19[illegible]. The [illegible], [illegible], that the [illegible] charge in question was "not [illegible] rate-making" which is [illegible]- [illegible] Harrington, 1976.

[illegible] Shipping Company, [illegible] 4[illegible] [illegible], [illegible], May [illegible], 19[illegible]

[illegible] Company tried
[illegible] The Commis-
[illegible] purchased
[illegible] reasonable
[illegible] that the most
[illegible] available should
[illegible] opinion
[illegible] rate and as
[illegible] adjustments. There was
[illegible] as a
[illegible]

[illegible] Incorpor-
[illegible] 80-16,
[illegible] adjustment
[illegible] fuel costs
[illegible] its
[illegible] 4.4. [illegible] recognizes
[illegible] adjustments
[illegible] adjustment was not
[illegible] require
[illegible]

[illegible] implemented
[illegible] treatment, in
[illegible] Attorney General, in
[illegible] whether or not
[illegible] under the
[illegible] without hearings,

[illegible] that such increases would not be illegal if the [illegible] were limited to purchase of power or fuel. In [illegible] issued June 4, 1981, the attorney general [illegible] that the legislature had apparently acquiesced to the Commission's practice of allowing [illegible] under an automatic adjustment clause and that [illegible] of the fuel adjustment clause may be made without a general consideration of the entire rate schedule of the company. See Op. Wis. Attorney General No. 25-81 (June 4, 1981).

Implementing automatic fuel cost adjustments is an accepted practice. As discussion of the previous cases support, in other jurisdictions where automatic fuel adjustments have been allowed, the courts have not considered the practice to be an attempt to increase future rates. Nor have the courts determined that a collection or surcharge necessary to adjust a miscalculation is retroactive ratemaking or illegal implementation of a new rate without following the procedure necessary in a general rate case.

Plaintiff in its brief seems to advocate a [illegible] position arguing that case law and statutes [illegible] the standards for determining "just and reasonable" rates, that rates must be prospective in effect [illegible] Utah Code Ann. §54-7-12(3)(d) (1983 Supp.), [illegible] called fuel pass-through statute, constitutes an [illegible] Utah Code Ann. §54-7-12 (1983 Supp.) which [illegible] the fuel elements of the account but to the non-fuel [illegible], i.e., non-tariff sales. Although an [illegible] in precisely this form has not been sought [illegible] in the past it is certainly consistent with [illegible] retroactive adjustments that are typically made in the account balancing process and certainly comports [illegible] the intent of the Commission to prevent windfall [illegible] to the Company or its ratepayers. Without [illegible] proposed adjustment an $18,000,000.00 revenue [illegible] goes to the Company's ratepayers and no revenue benefit flows to the Company even though the [illegible] is paying the fixed costs on the generating facilities which made the non-tariff sales possible.

The accounting adjustment the Company sought [illegible] the Commission granted was retroactive in nature [illegible] all other adjustments to the account components are retroactive in nature. The proposed adjustment is [illegible] different in terms of substance or form than those [illegible] made in the account. All are retroactive and [illegible] made in connection with the subject components. [illegible] Power does not assert in this case that rates [illegible] by the Company, or that rules, regulations, [illegible] or contracts affecting such rates are unjust, [illegible], discriminatory or preferential or that [illegible] rates are insufficient. The Company did not [illegible] the Commission did not allow any adjustment in [illegible] Company merely sought an adjustment in the balances due to the unusual circumstances affecting the account in the time frame specified above. <u>These balances had resulted from rates which had been charged and collected</u>. There could, therefore, be no retroactive ratemaking. The retroactive adjustment is not equivalent to retroactive ratemaking. The Company urges that the Commission has the authority to allow the subject adjustment and by so doing does not engage in retroactive ratemaking. If the Company's proposed adjustment in this case, however, suffers the infirmity suggested by Plaintiff, the Energy Balancing Account procedure established by the Commission, at the recommendation of Plaintiff, suffers from the same infirmity and in total constitutes retroactive ratemaking and is unlawful.

Intervenor further respectfully points out that Utah Code Ann. §54-7-12(3)(d) (1983 Supp.), the so-called fuel pass-through statute, speaks only to <u>fuel costs</u> and <u>purchased energy costs</u>. There is no mention or direction that <u>non-tariff sales revenues</u> are to be exempted from treatment in normal rate case circumstances. Accordingly, the Commission in establishing the account and including therein non-tariff sales revenues went well beyond the legislative directive and in so doing acted without authority and the EBA in its [illegible] be declared unlawful. See <u>Basin Flying</u> v. <u>Public Service Commission</u>, 531 P.2d 1303 [illegible]).

In conclusion, the Company submits that [illegible] (2)(d) of §54-7-12 constitutes an exception to general rate case procedures specified in subpart [illegible] of §54-7-12, that the Utah fuel pass-through [illegible] relates only to fuel and purchased energy [illegible], that practice under the EBA has involved the [illegible] retroactive adjustments to the account, that [illegible] adjustment sought in the case at bar does not [illegible] fuel or purchased energy costs but non-tariff [illegible] revenue, and that the Commission adopted EBA procedure is considerably broader than the statute [illegible] in that it regulates revenues from non-tariff [illegible] well as fuel and purchased energy costs. Based upon the foregoing intervenor submits that the accounting modification allowed by the Commission is consistent with past practice under the EBA procedure [illegible]sistent with Commission policy to prevent [illegible] benefits to ratepayers as well as the Company. However, this Court is persuaded that the proposed accounting modification constitutes retroactive rate-[illegible]

Intervenor submits that

1. all of the retroactive adjustments typically made in the EBA procedure constitute retroactive ratemaking and are therefore unlawful and

> . . . the EBA procedure as presently adopted by the Commission goes well beyond the statutory directive and accordingly the whole accounting procedure is contrary to law and should be declared unlawful.

POINT II

THE COMMISSION'S ORDER ALLOWING AN ACCOUNTING ADJUSTMENT IN THE ENERGY BALANCING ACCOUNT DOES NOT VIOLATE THE RULE AGAINST RETROACTIVE RATEMAKING

Plaintiff argues in Point II of its Brief that the Commission engaged in retroactive ratemaking, directly contravening Utah Code Ann. §54-4-4(1) (1983 Supp.), when it allowed the subject EBA accounting modification in its Order issued December 30, 1982 in Case No. 82-035-14.

Intervenor Utah Power submits that the Commission Order allowing the accounting adjustment in the EBA was not retroactive ratemaking but was, rather, an adjustment clearly authorized under Utah Code Ann. §54-7-12 (1983 Supp.) and Commission Report and Order in Case Nos. 78-035-21 and 79-035-03 issued July 20, 1979. Further the accounting modification is permitted pursuant to the Commission's authority to regulate accounting practices of public utilities [See Utah Code Ann. §54-4-23 (1953)] and this authority should be distinguished from the general ratemaking provisions as above described. See also Office of Consumer's [illegible] v. Public Utilities Commission of Ohio, Ohio [illegible] Court, No. 82-1796, August 31, 1983.

The Company agrees that rate fixing, as such, [illegible] accomplished retroactively. But in order to [illegible] what elements or facts have constituted [illegible] ratemaking, one must analyze case law where [illegible] has appeared, and compare those facts to the [illegible] case. The Company will show how the facts and [illegible] in the instant case are different from [illegible] which the court determined that certain [illegible] actions did constitute retroactive ratemaking. The facts in the instant case are more [illegible] to the facts in cases where the action did [illegible] constitute retroactive ratemaking.

The elements of retroactive ratemaking are [illegible] in case law. In Edmiston, (1977), cited supra, the court explained that retroactive ratemaking [illegible] when an additional charge is made for past use [illegible] utility service:

> Technically, retroactive ratemaking occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rate, for such past use.

[illegible] at 194.

In Edmiston, 1977, the question arose concerning whether or not a surcharge for fuel adjustment [illegible] retroactive ratemaking. The court did not [illegible] surcharge, but not on the grounds that it was retroactive ratemaking. The court concluded that the [illegible], when it issued an order allowing the surcharge for fuel, was acting in excess of its authority [illegible] the statute allowing that particular type of [illegible] indirect rate increases was no longer effective. Id. at 196. The case serves, among other things, to describe just what "retroactive ratemaking" is.

Retroactive ratemaking was one of the main issues discussed in City of Los Angeles v. Public Utilities Commission, 102 Cal.Rptr. 313, 7 C.3d 331, [illegible] P.2d 785 (1972). In City of Los Angeles, a telecommunications case, the court held that the public utilities commission has the power to prescribe rates prospectively only. In City of Los Angeles, Pacific requested that the Commission fix new rates for the purpose of refunds. The court denied the request pointing out that such an action would involve retroactive ratemaking. The court stated:

> To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively. As we have seen, the Legislature has expressly prohibited the granting of reparations on the basis of unreasonableness, where, as here, there is an

[illegible] rate, and the legislature has [illegible] prospective ratemaking.

[illegible]

Pacific Telephone & Telegraph Company v. Public Utilities Commission, 44 Cal.Rptr. 1, 62 C2d 634, 401 P2d 353 (1965) was another telecommunications case which involved a refund order made by the Commission. The Supreme Court held that the Commission had no power to order refunds of amounts collected by a utility pursuant to approved rates and prior to the effective date of the decision ordering general rate reduction because to do so would be retrospective and therefore unlawful. In Pacific Telephone the Commission found that the rates it fixed in 1958 should be reduced by a certain amount of money annually from the date the Commission initiated its investigation and [illegible] short of two years before issuance of its decision and it further ordered that the utility refund to customers amounts collected during the interim in excess of the reduced rates. Pacific Telephone and independent telephone companies challenged the refund order. The court explained that the legislature [illegible] the Commission that after a hearing it is to [illegible] order fixing rates to be enforced thereafter prospectively only. 401 P2d at 362-363. The [illegible] court determined that the Commission's power to [illegible] did not extend to rates previously enforced.

[illegible] the instant case are different [illegible] Los Angeles, and Pacific Tele- [illegible] the rates previously fixed [illegible] Public Service Commission are not at issue. [illegible] is a modification in [illegible] procedure, not a change in a rate [illegible]" which is why the courts in City [illegible] Los Angeles and Pacific Telephone disallowed the [illegible] order.

New England Telephone & Telegraph Company v. [illegible] Commission, 358 A2d 1 (R.I. 1976) was [illegible] case in which the telephone [illegible] certiorari proceedings to test the [illegible] reasonableness of a decision and order of [illegible] Commission. Among other issues [illegible] question of whether or not the [illegible] implementation of a rate plan [illegible] the company's revenue retroactively [illegible] allegedly wrongful order. In New [illegible] asked the court to permit calcula- [illegible] on the basis of known past losses, [illegible] resulting from the operation of an [illegible] order. That, the court determined, [illegible] courts in previous cases found to be [illegible] the non-retroactivity principal. 358 [illegible]. Therefore the court did not allow the [illegible] ratemaking. 358 A2d at 23. The [illegible] that a stay of a rate order was the [illegible]'s exclusive remedy under the circumstances.

In Mountain States Telephone & Telegraph [illegible] v. New Mexico State Corporation Commission, 90 N.M. 325, 563 P2d 588 (1977), a telephone utility was [illegible] a rate increase by the Corporation Commission. The telephone company argued that the Company's revenue [illegible] should be remedied by the court by ordering the Commission to make the rates retroactive. Mountain Bell complained that it lost revenue over a period of approximately six months because the Commission had not taken into consideration the most recent figures available to determine rates. The court decided that:

> ratemaking is legislative in its nature...it is axiomatic that legislative action operates prospectively, not retroactively.

[illegible] P2d at 604.

The court continued:

> retroactive remedies, which are in nature of reparations rather than ratemaking, are peculiarly judicial in character, and as such as beyond the authority of the Commission to grant.

[illegible] P2d at 604.

The court decided that the rates would not be applied retroactively and that the rates fixed by the Commission would apply prospectively only. 563 P2d at [illegible]. The Supreme Court reversed and remanded the case with instructions holding that (1) there was enough [illegible] present from which the Commission could have [illegible] reasonable rates consistent with its discre[illegible] policy issues with regard to apportion[illegible] it found that the utility was suffering from [illegible] deficiency and could have determined a rate [illegible] which the utility was entitled, (2) the [illegible] the Commission had six months according to [illegible]stitution to establish new rates did not make it [illegible] upon the Commission to act within six months, [illegible] Commission's failure to allow basic exchange [illegible] the utility to go into effect under bond after [illegible] requested to do so amounted to an unconstitu[illegible] confiscation of the utility's property, (4) the [illegible] was deprived of due process when it wasn't [illegible] adequate notice as to the extent to which cost of [illegible] formula would be applied and was not apprised [illegible] of evidence that the Commission would demand, [illegible] (5) the utility was entitled to have the Commission [illegible]structed that the most recent economic data available [illegible] be considered.

In the present case the Company is not asking [illegible] change in rates. The Company is requesting an [illegible] adjustment, not implementation of a rate [illegible] that would increase the Company's revenue retro[illegible] which would be illegal under the fact situa[illegible] forth in New England and Mountain States.

The Oklahoma Supreme Court, in Southwestern [illegible] Service Company v. The State of Oklahoma, 637 [illegible]), held that since the Oklahoma

Commission's order did not include the power to make retroactive adjustments in the fuel adjustment clause (established by final order of the Commission to be [illegible] the "fuel adjustment clause" statutes), the Commission could not adjust rates retroactive to the effective date of the final order of the Commission. In Oklahoma court decided that, since there was no express statutory authority retroactive to the effective date of the final order of the Commission establishing the rate, the Commission had no such power. In Southwestern the electric power utility appealed from orders of the Corporation Commission granting in part and denying in part the utility's application for a general rate increase. The court determined that where the utility's fuel adjustment clause was established by order of the Commission, and where its payments to a wholly owned subsidiary were in conformity with that order, the Commission improperly ordered a rebate of excessive charges made by the subsidiary to the utility for fuel purchases covering a period prior to the effective date of the order determining the charges to be excessive. In the subject case, the company seeks only to have the current Energy Balancing Account adjusted for a period between 1981 and 1982--not previous to the time the Order of the Commission establishing an Energy Balancing Account was issued. Therefore the Power Company's request for adjustment [illegible] Commission's Order allowing it was not retro- [illegible] under the law set forth in *South-*

[illegible] facts of the instant case are more [illegible] cases where the courts have determined [illegible] taken was *not* retroactive ratemaking. [illegible] (1976), cited *supra*, (*Shepherd's Citations* [illegible] case was reversed in *Edmisten* 1977, [illegible] discussed previously, even though the [illegible] to allow a surcharge in 1977, the 1976 [illegible] with the 1977 case) the court deter- [illegible] Commission order authorizing an electric [illegible] apply a temporary surcharge to collect for [illegible] fuel costs of prior months did not [illegible] retroactive ratemaking where the utility [illegible] calculate its fuel cost for a [illegible] until two months later. The facts of [illegible] 1976, where there was *no* finding of retro- [illegible], may be compared to those in the [illegible] In the instant case the Company could [illegible] project the revenues it received by [illegible] under the above described circumstances [illegible] resulting in the $18,000,000.00 [illegible] revenue margin. As in *Edmisten*, 1976, [illegible] should be allowed an adjustment and [illegible] does not constitute retroactive

[illegible]

[illegible] also found that courts have [illegible] retroactive rate adjustments [illegible] constitute retroactive ratemaking. In [illegible] Michigan *Electric Company v. Federal Power* [illegible], 502 F.2d 336 (D.C. Cir. 1974), the court [illegible] that the effective date of the electric com- [illegible] filing be changed retroactively where the [illegible] exceeded its authority by suspending use of [illegible] rate schedule. The Commission had delayed the [illegible] date of the company's rate filings prescribed [illegible] Federal Power Act. Therefore the Federal Power [illegible] order delayed the effective date of the [illegible] company's tariff and the electric company was [illegible] to make a retroactive rate adjustment and to [illegible] from its customers the difference between the [illegible] rates and the rates actually charged for the [illegible] period in question. 502 F.2d at 339-343. The [illegible] Power Commission had issued an order [illegible] an effective date for an electric company's [illegible] schedule and suspended the rates for five [illegible] thereafter. However, the Federal Power Commis- [illegible] not allowed to do so under the Federal Power [illegible] electric company filed a new tariff on June [illegible]. The Commission designated August 13th as the [illegible] date and then suspended its use until January [illegible]. The court determined that the Commission [illegible] to delay the effective date of the [illegible] until August 13, 1972 and also lacked [illegible] to suspend the new rates until January 13, [illegible] the Commission to give the rate filing [illegible] July 14, 1972. The court decided that the [illegible] company was entitled to the difference between [illegible] rates and the rates actually charged for the [illegible] period from July 14, 1972 to January 13, [illegible], but that the electric company could not collect [illegible] rate increases for the five month period [illegible]. The court concluded that a refund might be [illegible] after another hearing on the issue. In [illegible], the electric company was allowed to make [illegible] rate adjustments (i.e. collect the [illegible] between its old and new rates for a certain [illegible] which did not amount to retroactive ratemaking [illegible] Federal Power Commission.

Another case which addresses the issue of [illegible] ratemaking is *State of North Carolina, ex* [illegible] *Utilities v. City of Durham*, 282 N.C. 308, 193 [illegible] (1972). In *Durham*, the Supreme Court reversed [illegible] appeals judgment which reversed a previous [illegible] order permitting a distributor to increase [illegible]. The Supreme Court remanded the case so that [illegible] order permitting the distributor to [illegible] its rates could be implemented. The Supreme [illegible] the rule that a Utilities Commission may [illegible] rates retroactively so as to make them [illegible] for past service. 193 SE2d at 102. In [illegible], however, the court allowed the Commission's [illegible] permitting the distributor to increase its rates [illegible] public service sought rate increases for [illegible] not increasing the company's return upon properties but of recovering the additional costs [illegible] gas purchased from its supplier so as to avoid [illegible] in such a return. The Commission did not [illegible] that the return earned by the Public Service upon its property, prior to the increases in the rates, was [illegible] unreasonable and therefore the court [illegible] the court of appeals decision which would have [illegible] a refund.

In Southwest Gas Corporation v. The Public [illegible] Commission of Nevada, 86 Nev. 662, 474 P2d 379 [illegible], a case in which the gas company was ordered by the Public Service Commission to follow certain billing [illegible] required to make refunds to customers, the Supreme [illegible], among other issues, decided that the Public [illegible] Commission acted within permissible limits of discretion in ordering refunds to customers and affirmed the district court's judgment. In this case [illegible] held:

> It is a basic legal principal that a rate is made to operate in the future and cannot be made to apply retroactively, here, however, we find no

> evidence of an attempt by the respondent to apply a rate retroactively.

Id. at 383.

In this case the court did not find retroactive ratemaking because it found that the Commission's first order required prospective rule amendments [illegible] the gas company from indulging in any long [illegible] and by requiring it to adhere to a California altitude chart. In another part of the order the [illegible] found that the Commission imposed sanctions against the gas company for its unjustified use of long [illegible] billing and for its failure to adhere to an Altitude Adjustment Schedule which it had on file and the court did not find such orders to be an attempt to apply a rate retroactively. 474 P2d at 383.

<u>Shell Oil Company v. Federal Power Commission</u>, [illegible] F2d 1061 (5th Cir. 1975), was a case in which the Commission promulgated a national rate which was not shown to be unjust or unreasonable and was upheld by the court of appeals. In <u>Shell Oil Company</u> the court held that:

> replacing one incentive structure with another or providing new alternative rate system is an exercise of Federal Power Commission's discretion which does not amount to retroactive rate regulation...

Id. at 1063.

<u>Highland Resources Inc. v. Federal Power Commission</u>, 537 F2d 1336 (5th Cir. 1976), was a case

[illegible] filings were given retroactive effect to [illegible] filing of said applications and such action [illegible] constitute retroactive ratemaking.

As in the cases cited and analyzed above, the [illegible] the Company sought and the Commission [illegible] did not constitute retroactive rate making. In [illegible] instant case, the rates were not at issue. The [illegible] is not seeking a rate increase. No order was [illegible] altering rates. The instant case dealt with [illegible] the Energy Account and with the issue of treatment of nontariff resale revenue and how that [illegible] should be apportioned. The Commission's order [illegible] the requested adjustment was justified under [illegible] findings in the case and under current case law [illegible] pass-through fuel adjustments.

POINT III

[illegible] OF FINDINGS OF CONCLUSIONS THAT THE INCREASE [illegible] RATES IS JUST AND REASONABLE DOES NOT RENDER THE [illegible] COMMISSION ORDER ARBITRARY AND CAPRICIOUS [illegible] AN ACCOUNTING MODIFICATION AND NOT AN INCREASE [illegible] RATES WAS AT ISSUE BEFORE THE COMMISSION

Plaintiff argues that Utah law requires that [illegible] charged by utilities be just and reasonable, that [illegible] Commission has authority, after hearing, to fix [illegible] that the Commission must make findings [illegible] substantial evidence as to each essential [illegible] component. Plaintiff further argues that [illegible] in the subject case did not follow the [illegible] law and, accordingly, the Commission's [illegible] arbitrary and capricious and the "rate [illegible]" granted the Company is unlawful. Plaintiff [illegible] there are no findings or conclusions that [illegible] in rates is just and reasonable and that [illegible] is no competent or substantial evidence to [illegible] finding.

The Company agrees with the Plaintiff's [illegible] statement of the law but does not agree with [illegible]'s suggested application thereof. This [illegible] a rate case. The matters considered in [illegible] have been carved out of the traditional rate [illegible] and have been treated separately since the [illegible] account was created.

With respect to the Division's position that [illegible] be substantial evidence to support findings [illegible] this case there are not adequate findings [illegible] conclusions and an order authorizing a "rate [illegible]" the Company agrees. Again this is not a rate [illegible] Company is not seeking a rate increase. No [illegible] issued altering rates. This is a case [illegible] the issue of treatment of non-tariff [illegible] and with respect to that issue, the [illegible] there is substantial evidence in this [illegible] to support the findings, conclusions and order [illegible] Commission authorizing the accounting adjust-[illegible] The Division does not contest this. The Divi-[illegible] only that the Commission has exceeded its authority in improperly granting a rate increase and [illegible] order constitutes retroactive ratemaking.

In conclusion and based upon the above, the [illegible] respectfully submits that the case now before [illegible] Commission is not a rate case but a case dealing with accounting modification in an account which the Commission has ordered be treated separate and apart from general rate hearings. The adjustment proposed by [illegible] Company and approved by the Commission was supported by substantial evidence and based upon that evidence was found to be just and reasonable. The Company accordingly urges the Court to affirm the Commission's Orders.

CONCLUSION

The Commission allowed accounting modifica-[illegible] the subject FBA permits a retroactive adjust-[illegible] the stated intent of the Commission to [illegible] windfall revenue benefits to ratepayers or the [illegible] Without the adjustment a windfall benefit of [illegible] the benefit of the [illegible] customers to the amount in [illegible] by the Commission to prevent [illegible] result, the Company respectfully [illegible] the Commission's order herein preventing [illegible] result should be affirmed.

RESPECTFULLY submitted this 19th day of [illegible], 1983.

Thomas W. Forsgren

THOMAS W. FORSGREN
ROSEMARY RICHARDSON
Attorneys for Intervenor
Utah Power & Light Company
1407 West North Temple
Salt Lake City, Utah 84116

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that two true and correct [illegible] the foregoing Brief of Intervenor Utah Power [illegible] were mailed or delivered this 19th day [illegible], [illegible], to each of the following:

[illegible]
[illegible]
[illegible], Chief
Assistant Attorney General
[illegible]
Assistant Attorney General
[illegible] Rec. Div.
Attorneys for Plaintiff
[illegible] Business Regulation,
[illegible] Public Utilities
[illegible] Building
[illegible], Utah 84114

[illegible]
Assistant Attorney General
Attorneys for Plaintiff
[illegible] Consumer Services
[illegible] Building
[illegible], Utah 84114

[illegible] Commission of Utah
[illegible] Building
[illegible] City, Utah 84111

Thomas W. Forsgren